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No. 99-9073

In the Supreme Court of the United States

PAULA L. BUFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court of appeals should apply a *de novo* or deferential standard of review to a district court's determination that a defendant's prior sentences were not "related" because they did not result from offenses that were functionally "consolidated for trial or sentencing," within the meaning of Application Note 3 to Sentencing Guidelines § 4A1.2.

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OPINION BELOW

The opinion of the court of appeals (J.A. 54-63) is reported at 201 F.3d 937.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2000. The petition for a writ of certiorari was filed on April 10, 2000, and was granted on September 26, 2000. J.A. 65. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

SENTENCING GUIDELINES INVOLVED

Reprinted in an appendix to this brief (App., *infra*, 1a-3a) are the relevant provisions of 18 U.S.C. 3742(e), Sentencing Guidelines § 4A1.2, Application Note 3 to Guidelines § 4A1.2, Guidelines § 4B1.1, Guidelines § 4B1.2, and Application Note 3 to Guidelines § 4B1.2.

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Eastern District of Wisconsin on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Petitioner was sentenced to 188 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay $2,615 in restitution. J.A. 45, 46, 51. The court of appeals affirmed. J.A. 54-63.

1. On January 23, 1992, petitioner was stopped by officers of the Milwaukee, Wisconsin, police department on suspicion of having committed the armed robbery of a service station earlier that day. After petitioner was stopped, she directed the police to her residence, where the officers found cocaine. Petitioner admitted to the officers that she sold cocaine and that the cocaine found in her house belonged to her. She also admitted to the officers that she committed the armed robbery of the service station, as well as three other armed robberies during the previous two years. Pet. C.A. Supp. App. 132-133, 151-152.

On January 27, 1992, petitioner was charged with felonies in two separate criminal complaints filed in Milwaukee County Circuit Court. In Case No. F-920368, petitioner was charged with five counts of armed robbery, alleged to have occurred on March 18, 1990, May 18, 1990, December 4, 1991, December 9, 1991, and January 23, 1992. Pet. C.A. Supp. App. 150-

152. In Case No. F-920369, petitioner was charged with possession of a controlled substance (cocaine) with intent to deliver, which offense occurred on January 23, 1992. *Id.* at 132-133. The complaints were signed by different Assistant District Attorneys. *Id.* at 133, 152.

The armed robbery charges were initially assigned to Judge Ted E. Wedemeyer, Jr., of Milwaukee Circuit Court Branch 34, and the drug case was assigned to Judge Janine Geske, of Milwaukee Circuit Court Branch 23, a unit of the court that principally heard narcotics cases. C.A. Supp. App. 132-133, 137, 157, 175. The two cases initially proceeded on separate tracks. On February 11, 1992, Judge Geske scheduled the narcotics case for a jury trial on March 23, 1992. The narcotics prosecution was handled principally by Assistant District Attorney Jack Stoiber. Pet. C.A. Supp. App. 137. On March 20, 1992, at a pretrial hearing before Judge Geske, petitioner entered a guilty plea to the charge of possession of cocaine with intent to deliver. Petitioner's attorney then informed Judge Geske that the armed robbery charges pending before Judge Wedemeyer were scheduled for a possible guilty plea hearing on June 4, 1992, and asked Judge Geske to postpone sentencing until after that date. *Id.* at 147.[1] Judge Geske declined to postpone sentencing for the resolution of the armed robbery case, however, and ordered a sentencing hearing in the narcotics case on May 21, 1992. *Id.* at 148.

Meanwhile, on February 11, 1992, at a status conference in the armed robbery case, Judge Wedemeyer

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[1] The docket of the armed robbery case does not disclose that any guilty plea hearing in that case was scheduled for June 4, 1992. As explained below, petitioner pleaded guilty in the armed robbery case at a hearing held on April 20, 1992.

scheduled a jury trial for September 8, 1992. Pet. C.A. Supp. App. 158. That case was handled by Assistant District Attorneys Douglas Simpson and Michael Steinhafel. On April 20, 1992, at a hearing before Judge John DiMotto,[2] petitioner entered guilty pleas to four of the five armed robbery charges, and the fifth charge was dismissed. *Id.* at 163-170. At the hearing, petitioner's counsel told Judge DiMotto that petitioner had "another matter pending before Judge Geske" (the drug case) in which sentencing had already been scheduled, and asked the court to set the armed robbery matter over for sentencing on the same date and that the same presentence report be used for both cases. *Id.* at 165. In response, Judge DiMotto "adjourn[ed] the matter for sentencing before Judge Geske on May 21, 1992, * * * in conjunction with the sentencing on the other case [petitioner] ha[d] in Judge Geske's Court." *Id.* at 169.

On May 21, 1992, Assistant District Attorneys Simpson and Stoiber appeared before Judge Geske at

[2] The docket of the armed robbery charge states that Judge Geske of Branch 23 presided at the guilty plea hearing. Pet. C.A. Supp. App. 159. The transcript, however, indicates that Judge DiMotto of Branch 41 presided, *id.* at 163, and petitioner does not dispute that Judge DiMotto in fact presided, see Pet. Br. 7 n.2. The docket does not disclose why the case would have been transferred from Judge Wedemeyer to Judge Geske, nor why Judge DiMotto would have heard the case instead of Judge Geske on that date. A letter to Judge Geske's clerk from petitioner's counsel in the state court proceedings states that, at the guilty plea on the narcotics case, "Judge Geske 'volunteered' to have the Armed Robbery charges consolidated into her court for the entry of a plea and sentencing." Pet. C.A. Supp. App. 162. The transcript of the record of the guilty plea hearing in the narcotics case does not disclose any such statement by Judge Geske, however, and Judge Geske never entered any formal order of consolidation.

petitioner's sentencings on the armed robbery and the narcotics cases, respectively. The two Assistant District Attorneys made separate sentencing arguments. See Pet. C.A. Supp. App. 173-176. Stoiber stated to Judge Geske that, because petitioner's drug offense (which he handled) "was done independent of the armed robberies, I am not taking any position how that should impact relative to the armed robbery counts." *Id.* at 175. The court ordered separate sentences in the two cases, *id.* at 189-191, and entered separate judgments of conviction, *id.* at 135, 155-156. In the narcotics case, the court ordered petitioner's sentence to run concurrent to her sentence for armed robbery because of petitioner's honesty and her cooperation with the authorities. *Id.* at 191.

2. The instant case arose on March 18, 1998, when petitioner entered the State Financial Bank in Milwaukee and presented a teller with a threatening note. The note read, "Please be calm and no one will be hurt. There is a bomb in the bag set to go off in five minutes. Put loose bills in a paper bag. Count to fifteen before calling bomb unit. I will kill us all if necessary." The teller turned over $2,615 to petitioner, who then fled. The police later discovered that a white bag, which petitioner left behind, did not in fact contain a bomb, but contained two pieces of concrete. Presentence Report (PSR) ¶¶ 6, 8-9.

On November 3, 1998, a federal grand jury indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d).[3] See J.A. 1. On

[3] The indictment charged a violation of Section 2113(d) in that petitioner, in committing her offense, assaulted another person. J.A. 7; see 18 U.S.C. 2113(d) (enhanced sentence of up to 25 years' imprisonment if defendant "assaults any person, or puts in

December 14, 1998, petitioner pleaded guilty to that charge. See J.A. 17.

In its Presentence Report, the Probation Office recommended that petitioner be sentenced as a career offender under Sentencing Guidelines § 4B1.1, the career offender Guideline. See PSR ¶¶ 25, 79, 142. That Guideline requires that the defendant's offense level be significantly enhanced if she was at least 18 years old when the instant offense of conviction was committed, if the instant offense is a crime of violence or a controlled substance offense, and if the defendant has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." Guidelines § 4B1.1.

The Probation Office (and the U.S. Attorney) took the position that petitioner had two prior felony convictions that were relevant for the career offender Guideline—her state court conviction for armed robbery (which is a crime of violence) and her state court narcotics conviction. That position depended on the finding that petitioner's armed robbery and narcotics convictions are properly counted as two separate prior

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jeopardy the life of any person by the use of a dangerous weapon or device"). Under circuit law interpreting Section 2113(d), petitioner's claim to have a bomb satisfied the element of assault because "an assault is 'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.'" *United States* v. *Rizzo*, 409 F.2d 400, 403 (7th Cir.) (quoting *Ladner* v. *United States*, 358 U.S. 169, 177 (1958)), cert. denied, 396 U.S. 911 (1969); see also *United States* v. *Cooper*, 462 F.2d 1343, 1344 (5th Cir.) (use of simulated bomb constitutes "assault" under Section 2113(d)), cert. denied, 409 U.S. 1009 (1972); cf. *McLaughlin* v. *United States*, 476 U.S. 16, 17-18 (1986) (holding that unloaded gun is "dangerous weapon" under Section 2113(d) because, among other reasons, "the display of a gun instills fear in the average citizen").

felony convictions. Guidelines § 4B1.2(c), which defines terms for the career offender Guideline, provides that the term "two prior felony convictions" requires (among other things) that "the sentences for at least two of the aforementioned felony convictions are counted separately." Application Note 3 to Guidelines § 4B1.2 further states that the provisions of Guidelines § 4A1.2 (which provides instructions for computing a defendant's criminal history) "are applicable to the counting of convictions under §4B1.1."

Guidelines § 4A1.2(a)(2) in turn provides: "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c)" (referring to a defendant's criminal history points). And Application Note 3 to Guidelines § 4A1.2 states, in pertinent part:

> *Related Cases.* Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

The government argued that petitioner's prior armed robbery and narcotics convictions were not "related cases" under any of the tests set forth in that Application Note and therefore should be counted as two separate prior felony convictions. Petitioner argued, in response, that her narcotics and armed robbery convictions were "related cases" and therefore should

be counted as only one prior conviction under the career offender Guideline. See Addendum to PSR 1-8.

3. The district court agreed with the government that petitioner's prior convictions were not related cases, and therefore sentenced her under the career offender Guideline. J.A. 20-26, 27-28. The district court focused principally on petitioner's contention that the cases were related because they "were consolidated for trial or sentencing," within the meaning of Application Note 3 to Guidelines § 4A1.2.[4] The district court first noted that "[i]t is quite obvious that the guilty pleas that were entered in these two cases * * * were done on separate days before separate judges," and so the court saw the only question as whether the cases were consolidated "in terms of Judge Geske imposing sentence on May 21st of 1992." J.A. 21. The court further observed that "there was no agreement between the state and [petitioner] and her counsel with regard to the consolidation of these cases, either for purposes of charging or for purposes of disposition," and that "there was no agreement * * * that, in fact, consolidation was an integral part of the sentencing proceeding." J.A. 21.

Thus, the court stated, the only basis for an inference that the cases were "consolidated" was "the fact that sentences were imposed in two different cases on the

[4] Petitioner also argued at sentencing, in abbreviated form, that her offenses were related because they occurred on the same occasion and were part of a single common scheme or plan. See J.A. 18-19, 20. The district court discussed those theories only briefly at sentencing, perceiving that they had little force. J.A. 24-25. Petitioner renewed those arguments in summary form in the court of appeals, see Pet. C.A. Br. 26-27, but the court of appeals found them to be without merit, see J.A. 56, and petitioner has not renewed them in this Court, see Pet. Br. 12.

same date before the same judge, with no formal consolidation order." J.A. 21-22. But that inference was undermined, the court found, by the fact that "two different assistant district attorneys appeared at the sentencing hearing with respect to each of their respective cases." J.A. 22. That fact, the court found, supported a conclusion that the executive branch of the state government, acting within its discretion, had not consolidated the two cases for charging or sentencing purposes, J.A. 22, and that the two prosecutors had "separate interests here," J.A. 24. The court further observed that the two cases were otherwise not related because "[t]he drugs were, other than the temporal relationship, unrelated [to the robberies]. It wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs that she was charged with possessing." J.A. 25. Accordingly, the court applied the career offender Guideline to petitioner and sentenced her to a term of 188 months' imprisonment. J.A. 45, 52.

4. The court of appeals affirmed. J.A. 54-63. Focusing on whether petitioner's state armed robbery and narcotics offenses were "consolidated" under Application Note 3 to Guidelines § 4A1.2, the court stated that, under its decisions, mere "joint sentencing for administrative convenience is not 'consolidation for sentencing'" under that Application Note, but that "a formal order of consolidation is unnecessary," and "cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint." J.A. 58. The court suggested that "elements of [petitioner's] situation support either characterization," and so "the standard of appellate review may be dispositive." J.A. 59.

The court of appeals then concluded that it should apply a deferential standard of review to the district court's determination that petitioner's state court charges were not consolidated. J.A. 59-63. The court remarked that "relatedness" and "consolidation" are not "pure questions of law," as "[n]o legal rule specifies what it means for cases to be 'consolidated for sentencing.'" J.A. 60. Rather, because the court had adopted a "functional approach to consolidation, it [is] impossible to say that one characterization rather than another [of the record of state proceedings] is mandatory." J.A. 60. The court concluded that "[w]e have instead a classic mixed issue, where the court must apply legal norms to classify the facts. And disputes about the proper characterization of events, when legal norms guide rather than determine the answer, are principally committed to the district courts, with deferential appellate review." J.A. 60-61. In particular, the court relied on *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), which it read to hold that, "when the legal inquiry resists statement as a rule of general applicability, and when the application of that rule is a case-specific determination, courts of appeals should treat the district judges' conclusions deferentially." J.A. 61.

The court further observed that "[h]ow best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties." J.A. 62. In addition, it noted that "[q]uestions concerning application of the Guidelines generally are reviewed deferentially, unless the district court makes an identifiable legal mistake." J.A. 62 (citation omitted). Thus, it concluded, "whether cases have been 'consolidated' for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals." J.A. 62. Because the court of appeals could not conclude (and petitioner did not argue) that the district court had clearly erred in finding that petitioner's state court cases were not consolidated, the court of appeals affirmed the district court's application of the career offender Guideline to petitioner's sentence. J.A. 62-63.

SUMMARY OF ARGUMENT

A. The court of appeals correctly applied a deferential standard of review to the district court's determination that petitioner's two prior convictions had not been functionally consolidated, and were therefore not related under Sentencing Guidelines § 4A1.2. The issue before the district court was not (as petitioner maintains) the legal construction of the term "related" in that Guideline, nor the legal construction of the term "consolidated" in Application Note 3 to that Guideline. Rather, the issue before the district court was whether, on the facts of this case, petitioner's prior sentences had in fact been functionally consolidated.

The resolution of the functional-consolidation question turns primarily on the historical facts, as determined by the district court. Just as a district court may determine as a factual matter whether a defendant's offenses were separated by an intervening arrest, occurred on the same occasion, or were part of a single common scheme or plan—all of which are determinations that dictate whether or not the defendant's offense were "related" under the Guideline—so a district court determines whether those offenses in fact were actually or functionally consolidated. If the district court concludes that the offenses were functionally consolidated, then it follows as a matter of law under the applicable Guideline that they were "related." Such intensely factual determinations plainly qualify for deferential review in the court of appeals.

B. The Court need not view the consolidation question as a pure factual issue in order to conclude that deferential review applies. The court of appeals viewed the functional-consolidation issue as a mixed question of fact and law, and the text of the Sentencing Reform Act of 1984, at 18 U.S.C. 3742(e), requires that the court of appeals give "due deference to the district court's application of the guidelines to the facts." Under that provision, the court of appeals should not engage in plenary review of the district court's determination that a defendant's prior convictions were "consolidated," provided that the district court applies the correct legal rule governing what it means to be "consolidated." Rather, in reviewing the characterization of the facts under the Guidelines, the courts of appeals should give deference to the sentencing court's determinations. The long historical tradition of district court discretion in sentencing also indicates that the proper standard of appellate review is deferential. The Sentencing Reform Act did not displace that long tradition, and it allowed the courts of appeals to engage in only a limited supervision of district court sentencing decisions. Moreover, the sentencing determination at issue in this case, which bears on the seriousness of a defendant's prior criminal history, is a classic kind of sentencing decision in which trial courts have long engaged and have substantial expertise.

Institutional considerations also point towards a deferential standard of review. Little would be gained by *de novo* appellate review of the kind of Guidelines application at issue in this case. District courts have superior institutional capacity to that of the courts of appeals to ensure that the Guidelines are uniformly applied, because they encounter many more Guidelines cases than do the appellate courts. The district courts

will also be required to engage in an extensive review of the records of the defendants' prior cases and to draw factual inferences from those records about what the actors in the prior cases intended to do. There is no reason to conclude that that task will be performed better or more accurately if a layer of plenary appellate review is added. Nor is there any other reason to require *de novo* appellate review. Guidelines determinations that apply rules of decision to particular facts do not require courts to clarify laws that affect primary conduct in large numbers of cases, an activity that typically calls for plenary appellate review. For example, the functional-consolidation determination is not intended to guide the conduct of the police with respect to individuals' constitutional rights. Rather, it is a purely retrospective evaluation of a state court's conduct that is likely to be of little relevance for state courts in future situations when they decide whether to consolidate a defendant's criminal cases.

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPLIED A DEFERENTIAL STANDARD OF REVIEW TO THE DISTRICT COURT'S CONCLUSION THAT PETITIONER'S PRIOR CONVICTIONS WERE NOT CONSOLIDATED

Section 3742(e) of Title 18 provides that, when an appeal of a sentencing decision is taken,

> [t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous *and shall give due deference to the*

district court's application of the guidelines to the facts.

18 U.S.C. 3742(e) (emphasis added). This Court has explained that Section 3742(e), including the language just quoted, "manifests an intent that district courts retain much of their traditional sentencing discretion." *Koon* v. *United States*, 518 U.S. 81, 97 (1996). Indeed, Congress's use of the phrase "due deference" in Section 3742(e) "seems incompatible with the nature and scope of de novo review. When courts review an issue de novo, they consider the matter anew, as if it had not been heard before and as if no decision had previously been rendered. This is hardly consistent with a requirement to give due deference." Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 621, 636 (1992) (internal quotation marks and footnotes omitted).

The question in this case—whether petitioner's prior convictions were consolidated as a functional matter for purposes of determining how many prior convictions she had under the Sentencing Guidelines—calls for deferential review. While the consolidation question, like other relatedness determinations, revolves around findings of historical fact, the Court need not classify it as a purely factual inquiry in order to hold that a deferential standard of review applies on appeal. A district court's determinations of mixed questions requiring the application of the Guidelines to the facts are entitled to "due deference," 18 U.S.C. 3742(e), and that means deferential rather than *de novo* review under the analysis established by this Court's precedents.

A. Determining Whether A Defendant's Prior Convictions Were Functionally Consolidated Turns Predominantly On The Ascertainment Of Historical Facts

1. At the outset, it is important to identify the precise issue that the district court faced in determining whether petitioner should be sentenced under the career offender Guideline. Petitioner argues (Pet. Br. 17) that the lower courts were called upon to determine whether her two prior convictions were "related" within the meaning of Guidelines § 4A1.2(a)(2). She further contends (Pet. Br. 29) that that task required the lower courts to construe the term "related" in that Guideline, as well as the term "consolidated" in Application Note 3 to that Guideline. Therefore, she submits (Pet. Br. 19, 29), the lower courts were necessarily engaged in interpretation of the meaning of the Guideline and the Application Note, a "classic textual analysis" (*id.* at 29) that is a "quintessentially legal" task (*id.* at 34).

Petitioner's arguments misperceive the issue that the district court resolved and that the court of appeals reviewed. In a sense, it is true that the lower courts were ultimately required to determine whether petitioner's prior convictions were "related," in that the Sentencing Guidelines required sentencing as a career offender if and only if her two prior convictions were not related. But it is not true that the lower courts were required in this case to *construe* the meaning of the term "related" in the Sentencing Guidelines. Rather, that task was undertaken by the Sentencing Commission in Application Note 3 to Guidelines § 4A1.2, where the Commission defined "related cases" to mean that the defendant's sentences "(A) occurred on the same occasion, (B) were part of a single common

scheme or plan, or (C) were consolidated for trial or sentencing." The Sentencing Commission's commentary to Guidelines § 4A1.2 gave the pertinent legal interpretation of the meaning of the Guideline; it provided a generally applicable definition of "related cases" to include cases that "were consolidated for trial or sentencing." Cf. *Stinson* v. *United States*, 508 U.S. 36, 44 (1993) (analogizing commentary to career offender Guideline to "an agency's interpretation of its own legislative rule").

Nor were the lower courts called upon in this case to construe the meaning of the term "consolidated" in Application Note 3 to Guidelines § 4A1.2. That task had previously been performed by the Seventh Circuit, which had concluded in prior decisions that the concept of "consolidated" cases in that Application Note (and, therefore, the concept of "relatedness" in the Guideline) is sufficiently broad to include, not just cases that had been consolidated by a formal court order, but also cases that had been "functionally" or "*de facto*" consolidated.[5] See J.A. 58 ("[W]e have * * * held that * * * cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint."). The legal question whether the term "consolidated" in the Application Note includes cases that were functionally as well as formally con-

[5] See *United States* v. *Joseph*, 50 F.3d 401, 404 (7th Cir.) (stating that "we have held * * * that functional consolidation satisfies Application Note 3"), cert. denied, 516 U.S. 847 (1995); *United States* v. *Russell*, 2 F.3d 200, 204 (7th Cir. 1993) (stating general rule that, "[i]f the record should show that the sentencing court gave some kind of consolidated effect in the sentencing on different charges * * * there might well be a sufficient showing that the court had made a decision that the cases should be consolidated").

solidated *is* a matter of textual interpretation on which a court of appeals would not owe deference to a district court's determination.[6] But that is not the issue that was before the lower courts in this case.[7]

[6] It is also a question on which the courts of appeals are divided. The government has argued in the lower courts that as a legal matter the term "consolidated" in Application Note 3 to Guidelines § 4A1.2 means only cases that were formally consolidated, and not functionally or *de facto* consolidated. Some courts of appeals have agreed with that position, see, *e.g.*, *United States* v. *Correa*, 114 F.3d 314, 317 (1st Cir.) (collecting cases), cert. denied, 522 U.S. 927 (1997), but others have not (including the Seventh Circuit, in which this case arose). In this case, the court of appeals followed prior circuit precedent including functional consolidation within the meaning of the term "consolidated," and the government did not seek further review of that ruling. Therefore, this case comes to the Court on the assumption that two prior cases that are shown, on a particular record, to have been "functionally consolidated" are "consolidated" within Application Note 3 to Guidelines § 4A1.2, and are therefore also "related" cases under that Guideline.

[7] The difference between the construction of the *legal* meaning of the Guideline and the Application Note, which had already been performed by the Sentencing Commission and the Seventh Circuit, and the application of that Guideline and Application Note as so construed to the facts of this case, resembles the distinction between the two tasks undertaken by this Court in *Pierce* v. *Underwood*, 487 U.S. 552 (1988). In *Pierce*, the Court addressed the Equal Access to Justice Act (EAJA), which provides (at 28 U.S.C. 2412(d) (1994 & Supp. IV 1998)) that a district court may award attorney's fees against the government if the court finds that the government's position was not "substantially justified." That case required the Court both to determine the legal meaning of the term "substantially" (487 U.S. at 563-568) and to review whether the district court had properly applied that term to the facts of the case (*id.* at 568-571). The Court made the first determination *de novo*, as appropriate to a court's ascertainment of the meaning of the statute, but reviewed the district court's application of the

Rather, the question before the lower courts in this case was whether petitioner's two prior convictions were, on the facts of this case, functionally or de facto consolidated. At issue, therefore, was not the interpretation of the Guideline, but whether the Guideline directing that "related" cases be treated as a single case —as previously interpreted by the Sentencing Commission and the court of appeals to reach cases that were "functionally consolidated" —applied to the facts of this particular case. That question presented the district court with the task of determining and classifying historical facts, not a problem of textual analysis.

2. The issue before the district court in this case, therefore, turned primarily on the facts. Indeed, that is true for each of the ways that cases may be "related" under Guidelines § 4A1.2. Application Note 3 to that Guideline first sets forth a legal rule that "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest." The Note further gives content to the Guideline by providing the three-pronged definition of "related cases" discussed above ("occurred on the same occasion"; "part of a single common scheme or plan"; "consolidated for trial or sentencing"). See pp. 15-16, *supra*. Thus, the Application Note establishes four subcategories to the category of "related cases." But whereas the Sentencing Commission's undertaking to give more precise content to the general category of "related cases" was a legal function, the task of determining whether a particular case falls into one of the four subcategories is a matter to be determined on the facts of each case.

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statute to the facts of the case for abuse of discretion (*id.* at 559-563, 570-571).

The question whether a defendant's previous offenses were "separated by an intervening arrest" ordinarily presents a binary temporal issue: either a defendant's two offenses were separated by an arrest, or they were not. While there may occasionally be cases in which it is difficult to determine whether two offenses were in fact separated by an arrest, that issue is fundamentally a question of historical fact.[8] Similarly, the question whether two offenses "occurred on the same occasion" is normally a factual question for the district court to resolve. If the district court determined that the two offenses did, as a factual matter, occur on the same occasion, then, as a legal matter, the offenses would also be deemed "related" under Guidelines § 4A1.2. But the logically prior question whether the offenses occurred on the "same

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[8] See, *e.g.*, *United States* v. *Huggins*, 191 F.3d 532, 539 (4th Cir. 1999) (applying clear-error review to district court's determination that defendant's two offenses were separated by an intervening arrest), cert. denied, 120 S. Ct. 1968 (2000). We do not mean to suggest, however, that the factual question whether a defendant's offenses were separated by an intervening arrest will never have a legal component. For example, a trial court, in determining whether a defendant's offenses were temporally separated, might have to resolve the legal question whether a particular offense is deemed a "continuing crime." The answer to that legal question would be subject to *de novo* review in the court of appeals, and if the court of appeals concluded that the district court had erred in its legal characterization of the crime, then it might be required to remand the case for resentencing. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982) ("[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."). But once the courts arrived at the proper answer to such legal questions, the question whether the defendant's offense actually continued to a particular date would be a factual issue for the district court to resolve, subject to deferential review on appeal.

occasion" would generally be an issue of fact on which the court of appeals would give deference to the district court's determination.

The same is true of a district court's determination whether a defendant's prior offenses were "part of a single common scheme or plan" under Application Note 3 to Guidelines § 4A1.2. As the Second Circuit has observed, "[w]hether or not acts have been performed pursuant to a 'single common scheme or plan' is essentially a question of fact—both as to whether a single common scheme or plan existed and as to whether the prior offenses were part of it." *United States* v. *Butler*, 970 F.2d 1017, 1024, cert. denied, 506 U.S. 980 (1992). Most courts of appeals have adopted an intensely factual approach to the "common scheme or plan" issue. Courts have stated, for example, that the proper focus under that prong of the "related crimes" test should be on the "factual commonality" between the crimes, "as reflected in criteria such as temporal and geographical proximity" and "common victims,"[9] and that resolution of the matter ordinarily requires an

[9] *United States* v. *Wiseman*, 172 F.3d 1196, 1219 (10th Cir.), cert. denied, 120 S. Ct. 211 (1999); see also *United States* v. *Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995) (looking to "common victims, common accomplices, common purposes, or similar *modus operandi*"; applying clear-error review), cert. denied, 517 U.S. 1112 (1996); *United States* v. *Elwell*, 984 F.2d 1289, 1295-1296 (1st Cir.) (remanding for evidentiary hearing on "single common scheme or plan" issue, noting that defendant offered to call his fellow bank robbers to confirm that their robberies were part of the same conspiracy, and stating that "there is nothing implausible about [that] proffer"), cert. denied. 508 U.S. 945 (1993).

examination of the subjective intent of the defendant in carrying out his crimes.[10]

So too here, the question whether a defendant's prior convictions were "consolidated" for trial or sentencing turns predominantly on questions of fact, like the other three inquiries bearing on whether a defendant's prior offenses were "related cases." Indeed, the very concept of functional consolidation requires the sentencing court to determine whether the court that adjudicated the defendant's prior cases *in fact* treated them as though they were consolidated, even though they were not consolidated as a formal matter. While there is an element of characterization in that analysis, the basic question is the essentially factual one of how the previous trial court actually acted, not whether its actions had particular legal consequences for its court system (although evidence of the consequences of its action may shed light on the proper resolution of that factual question). Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289-290 (1982) ("Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."). Thus, courts have described the "functional consolidation" issue as whether the prior court "effec-

[10] See *United States* v. *Beckett*, 208 F.3d 140, 148 n.3 (3d Cir. 2000) (emphasizing "the intent of the defendant at the time of the prior offense"); *United States* v. *Irons*, 196 F.3d 634, 638-639 (6th Cir. 1999) (stating that "'scheme' and 'plan' are words of intention," and holding that the "defendant must show that he either intended from the outset to commit both crimes or that he intended to commit one crime which, by necessity, involved the commission of a second crime"); *United States* v. *Joy*, 192 F.3d 761, 770 (7th Cir. 1999) (same), cert. denied, 120 S. Ct. 2704 (2000); *Butler*, 970 F.2d at 1024 ("Both inquiries require an evaluation of subjective as well as objective elements[.]").

tively" or "*de facto*" treated the two offenses as one.[11] That determination is closely akin to the kind of fact-finding that is typically made the principal responsibility of the district courts.

To the extent that the question whether a defendant's prior convictions were functionally consolidated depends on issues of historical fact, the district court's determination on that issue is plainly subject to deferential review on appeal. See *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); cf. *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986).[12] But the Court need not view the ultimate determination of the functional-consolidation question as purely factual in order to apply deferential review, because applications of law to facts under the Guidelines also call for deferential rather than *de novo* review.

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[11] See *United States* v. *Huskey*, 137 F.3d 283, 288 (5th Cir. 1998) ("*de facto* 'consolidated'"); *Russell*, 2 F.3d at 204 ("functional consolidation" requires "a record that shows the sentencing court considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions"); see also *United States* v. *Mapp*, 170 F.3d 328, 338 & n.15 (2d Cir.) (stating that court will consider cases functionally consolidated "only where there exists a close factual relationship between the underlying convictions," and applying clear-error standard of review to that determination, in light of "the (obviously) fact-intensive nature of the inquiry") (internal quotation marks omitted), cert. denied, 120 S. Ct. 239 (1999).

[12] The district court may be required to make subsidiary factual findings before making the "ultimate" determination whether a defendant's prior cases were consolidated. The system of appellate review in the federal courts has traditionally not divided "findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287. All factual findings are subject to deferential review on appeal.

B. Deferential Review On Appeal Is Appropriate For Resolutions Of The Question Of Relatedness Or Functional Consolidation

The court of appeals viewed the questions of "relatedness" and "consolidation" in the application of Guidelines § 4A1.2 to be "a classic mixed issue, where the court must apply legal norms to classify the facts." J.A. 60. That position reflects the view that the concept of functional consolidation involves the characterization of historical fact under legal standards. It nonetheless remains true that the central question in functional-consolidation turns on analysis of the way in which the cases were treated by the original sentencing court. The standard of appellate review of that sort of application of law to fact should be deferential. That conclusion follows from the text of the statute, this Court's decisions, and the nature of the decision before the district court.

This Court has stated on several occasions that no bright line separates those mixed questions of fact and law that are principally committed to the decision-making of the district courts from those that are subject to *de novo* review on appeal. Compare, *e.g.*, *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988), with *Miller* v. *Fenton*, 474 U.S. 104, 113-114 (1985). The Court has, however, pointed to several factors to identify the proper standard of appellate review of trial court determinations. Congressional intent may dictate the appropriate standard of review. *Pierce*, 487 U.S. at 558-559 (noting that proper standard of review may appear from a "clear statutory prescription"); *Miller*, 474 U.S. at 114 (noting possibility that Congress may have spoken to the issue). The proper standard may also appear from "a long history of appellate practice"

or "a historical tradition." *Pierce*, 487 U.S. at 558; see also *Thompson* v. *Keohane*, 516 U.S. 99, 113 n.13 (1995) (noting tradition of entrusting determination of "negligence" to trier of fact). Where, however, neither congressional intent nor tradition yields the answer, and where the issue "falls somewhere between a pristine legal standard and a simple historical fact" (*Miller*, 474 U.S. at 114), the Court has generally concluded that the proper standard of review should turn on institutional considerations—in particular, whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Ibid.*

In this case, all those factors point decisively in favor of deferential review. As we now explain, the Sentencing Reform Act of 1984 and the tradition of trial court discretion in sentencing mark the decision at issue in this case as precisely the kind in which an appellate court should defer to the conclusions of the court below. Even absent such a statutory command and tradition, institutional considerations make clear that little is to be gained, and much to be lost, from *de novo* appellate review of a district court's application of the Guidelines to the facts of a particular case.

1. ***The Text of the Sentencing Reform Act Requires Deferential Review of the District Court's Application of the Guidelines to a Particular Case***

This case presents a circumstance in which a "clear statutory prescription" (*Pierce*, 487 U.S. at 558-559) establishes the appropriate standard of review. Section 3742(e) of Title 18 provides that, when an appeal of a sentencing decision is taken, the court "shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. 3742(e) (emphasis

added). As the Court noted in *Koon* v. *United States*, 518 U.S. at 97, the statute was intended to preserve the district court's traditional discretion in determining an appropriate sentence under the Guidelines.

Section 3742(e) does require only that the courts of appeals give "due" deference to the trial courts' application of the Guidelines to particular sets of facts, not that the courts of appeals defer in every circumstance. See *Koon*, 518 U.S. at 98 ("That the district court retains much of its traditional discretion does not mean appellate review is an empty exercise."). Thus, if the district court errs in its legal interpretation of a Guideline, the court need not defer to its application of that Guideline to a set of facts. *Id.* at 100 ("A district court by definition abuses its discretion when it makes an error of law."); see, *e.g.*, *Butler*, 970 F.2d at 1025 (remanding for resentencing because the district court erroneously concluded, as a matter of law, that temporally separated crimes can never be part of the same common scheme or plan). Nor must the court of appeals defer to a district court's factual decision in which egregious error is manifest. See, *e.g.*, *United States* v. *Rivers*, 929 F.2d 136, 139-141 (4th Cir.) (finding clear error in lower court's determination that defendant was not a career offender), cert. denied, 502 U.S. 964 (1991). But Section 3742(e) makes clear that, in the absence of legal error or clear factual error, the district court's determination that a Guideline applies to a particular set of facts is controlling.

2. *The Tradition of District Court Discretion in Sentencing Favors Deferential Appellate Review*

The historical tradition of broad district court discretion in sentencing decisions also supports the conclusion that a district court's application of a Guideline to a particular set of facts should be reviewed deferentially. "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal." *Koon*, 518 U.S. at 96. The Sentencing Reform Act "altered this scheme in favor of a limited appellate jurisdiction to review federal sentences," *ibid.*, but that Act did not "vest in appellate courts wide-ranging authority over district court sentencing decisions," *id.* at 97; see *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (the Sentencing Guidelines system "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion"). To the contrary, under the Guidelines system, the task of sentencing remains a highly individualized function in which the district court "must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98.

Indeed, if deference is appropriate to any aspect of a district court's decision that a Guideline applies to a particular set of facts, it is in this area, which involves the district court's determination of the defendant's prior criminal history. As the Court observed in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), recidivism is "as typical a sentencing factor as one might imagine." *Id.* at 230 (citing, *inter alia*, Guidelines §§ 4A1.1, 4A1.2). Sentencing courts have long experience with evaluating the seriousness of a

defendant's criminal history. See *id.* at 243 (noting that laws directing sentencing judges to increase punishment for recidivists "have a long tradition in this country that dates back to colonial times"). That experience well equips district courts to determine whether nominally different offenses in a defendant's past in fact reflect different (and persistent) manifestations of criminal conduct, or whether they are simply parts of a single incident that might not be repeated, or that has been treated as a single integrated set of violations for purposes of determining appropriate punishment.

3. *Institutional Considerations About the Sentencing Decision at Issue in This Case Also Support Deferential Review*

As we noted above (p. 24, *supra*), in determining whether a district court's decision on a mixed question of fact or law should be subject to deferential or plenary review on appeal, the Court has often looked to institutional considerations to determine which court is "better situated" to apply a legal standard to a particular set of facts. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (in determining whether facts of a particular case showed that a lawyer's actions met the standard of "frivolous" under Federal Rule of Civil Procedure 11, "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"). Institutional considerations strongly favor a deferential standard of appellate review to a district court's determination that a defendant's prior convictions were "consolidated" or "related."

a. A crucial institutional consideration is the district courts' leading role in promoting uniformity of sen-

tencing decisions. While in some circumstances the courts of appeals play the principal role in ensuring the uniform application of legal rules to particular sets of facts,[13] this Court has stressed that the application of the Guidelines system is not such a situation. "District courts have an institutional advantage over appellate courts" in managing the mine-run of sentencing cases because "they see so many more Guidelines cases than appellate courts do." *Koon*, 518 U.S. at 98. In deciding whether a defendant's two prior convictions were or were not consolidated, even a single district judge is likely to have much more information about how the same issue was treated in previous cases than a three-judge appellate panel, which is limited to prior reported decisions. The tip of the iceberg that the court of appeals views, moreover, may well not present a reliable cross-section of sentencing cases. Only a small minority of Guidelines sentencing determinations are appealed, see *id.* at 98-99, and those cases that involve application of law to fact (rather than clarification of legal issues under the Guidelines) are likely to be ones in which the appellant, be it the government or defense counsel, believes that the facts are aberrant and therefore call for error correction by the higher court. The trial court is more likely than the appellate court to have an accurate perception of how a particular issue involving the application of the Guidelines is resolved in the ordinary case.

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[13] See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996) (defining probable cause and reasonable suspicion); *Thompson* v. *Keohane*, 516 U.S. 99, 115 (1995) (whether defendant is "in custody" requiring warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966)); *Miller* v. *Fenton*, 474 U.S. at 114 (voluntariness of confession).

Second, the determination whether a defendant's convictions were functionally consolidated is likely to involve the district court in an extensive review of the records of the defendant's prior cases and may well require the court to make factual inferences about matters that do not appear clearly in the record. As we have explained, the very concept of functional consolidation requires a sentencing court to determine whether a prior trial court effectively treated two cases as one. The trial court is likely to have more insight about the practice of another trial court (even of another court system) facing similar concerns of workload and the administration of justice at the front line than is an appellate court. But even aside from that point, decisions in cases like this one require sentencing courts to infer, from the records of the defendant's prior cases, the way that the judges, prosecutors, defense counsel, and defendants in those cases understood how those cases were treated. There is no evident reason why a second, *de novo* review of the same materials by courts of appeals would necessarily yield more accurate results as a systemic matter.

Petitioner argues (Pet. Br. 34) that that determination turns on the interpretation of documents (the records of the prior cases) rather than the credibility of witnesses and so does not involve any special expertise of the district court. Live testimony may ordinarily not be necessary in resolving the consolidation issue, but there are likely to be cases in which transcripts are unavailable or the existing records leave gaps that must be filled by memories of the participants in order to determine what actually was intended to happen and what did happen at sentencing. In addition, this Court has recognized that, even apart from credibility determinations, deferential appellate review is also appropri-

ate "when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). Thus, a district court's inferences from a record of a prior case about how that case was managed—precisely the issue here—should also be entitled to deference on appeal.

b. By contrast, the "functional consolidation" issue does not present the institutional considerations that typically call for plenary appellate review. First, that determination does not require the court of appeals to enunciate or clarify general principles of law that will be applicable in a broad range of cases. As we have explained (pp. 15-17, *supra*), while the *textual explication* of a Guideline does involve that kind of legal determination, the application of a Guideline to a particular set of facts generally does not. Thus, contrary to petitioner's submission (Pet. Br. 35), the application of a Guideline to a particular set of facts is quite unlike the federal courts' function of determining state law (in diversity cases) or foreign law. In those situations, before the federal court applies the legal principle to a set of facts, it must determine and announce what the law is. That decision may have consequences far beyond the particular case before the court—indeed it may determine the outcomes in future cases in other court systems—and so in those contexts it is particularly important that the federal courts arrive at a coherent understanding of the state of the law. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 234 (1991). But a district court's application of a Guideline to a set of facts affects only the one case and does not establish a binding precedent for future cases before that district court or any other.

Second, the "functional consolidation" determination (or, even more broadly, the "relatedness" determination) is not intended to guide the primary conduct of other actors in the criminal justice system through the announcement of broadly applicable rules of constitutional law. In this respect the issue of consolidation is unlike the issues of probable cause and reasonable suspicion in *Ornelas* v. *United States*, 517 U.S. 690 (1996), the issue of custody in *Thompson* v. *Keohane*, 516 U.S. 99 (1995), and the issue of voluntariness in *Miller* v. *Fenton*, 474 U.S. 104 (1985). Those cases all involve situations where the federal courts are called upon to interpret the Constitution so that law enforcement officers will have a "set of rules which, in most instances, makes it possible to reach a correct determination beforehand" as to whether a particular law-enforcement action is justifiable. *Ornelas*, 517 U.S. at 697.

The consolidation issue, by contrast, involves a purely retrospective determination about how another court acted on a particular occasion. There is little reason to believe that a sentencing court's decision as to how another court acted will provide useful precedent for the future. In the first place, when a state trial court decides whether to treat a defendant's cases pending before it as *de facto* consolidated, it is most likely concerned with immediate issues of judicial economy and efficiency (and perhaps consequences for co-defendants' pending cases). It is much less likely that the court will have in mind possible consequences for the defendant's criminal history score in the future, should the defendant be convicted in the cases before it and then proceed to commit more crimes in the future.

Moreover, even if state trial courts might monitor federal courts' determinations that particular past cases

were or were not functionally consolidated, it is unlikely that the federal courts' decisions would provide useful guidance to them. State court systems vary widely. Also, the factual situations facing state trial courts in making decisions whether to treat cases as *de facto* consolidated are highly varied. There is little reason to believe that (for example) a Wisconsin state court faced with two narcotics charges against a defendant will find much useful guidance from a federal decision concluding that a Nevada state court five years earlier treated a particular defendant's two armed robbery cases as functionally consolidated.

c. In sum, the sentencing issue before the district court in this case is precisely the kind of matter that trial courts are well suited to resolve, and duplication of that effort at the appellate level would contribute only negligibly to the accuracy of the determination. Accordingly, the court of appeals correctly applied a deferential standard of review in this case and properly affirmed the sentence imposed by the district court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 3742(e) of Title 18, United States Code, provides in pertinent part:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

2. Sentencing Guidelines § 4A1.2(a)(2) provides:

> Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

3. Application Note 3 to Sentencing Guidelines § 4A1.2 provides:

> *Related Cases.* Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were

consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, §4A1.1(f) will apply.

4. Sentencing Guidelines § 4B1.1 provides, in pertinent part:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

5. Sentencing Guidelines § 4B1.2(c) provides:

> The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

6. Application Note 3 to Sentencing Guidelines § 4B1.2 provides:

> The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.